

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARCUS KILGORE,

Defendant.

ORDER

09-cv-328-bbc
08-cr-0038-bbc-01

Defendant Marcus Kilgore has filed a motion for post conviction relief under 28 U.S.C. § 2255. On January 9, 2009, defendant was convicted in this court of being a felon in possession of firearms and ammunition. On February 5, 2009, defendant appealed his conviction to the Court of Appeals for the Seventh Circuit. His appeal is pending.

Absent extraordinary circumstances, the district court should not consider § 2255 motions while a direct appeal is pending. United States v. Robinson, 8 F.3d 398 (7th Cir. 1993). Defendant has not alleged any extraordinary circumstances that require consideration of his § 2255 motion while his appeal is pending. Therefore, I will dismiss defendant's 28 U.S.C. § 2255 motion without prejudice because it is premature.

I am aware that 28 U.S.C. § 2244(a) would prevent the court from entertaining a second motion by defendant under 28 U.S.C. § 2255 if I had decided the legality of his detention in this motion. Because the motion is denied as premature and not on the merits, defendant may file a new § 2255 motion after his appeal is decided. Such a motion would not be “second or successive” motion under 28 U.S.C. 2244(a). O’Connor v. United States, 133 F. 3d 548, 694 (7th Cir.1998) (when § 2255 petition is returned to petitioner on ground that no collateral attack could be begun while appeal pending, it does not count as petition; petitioner may file new motion after appeal decided without obtaining permission from the court of appeals).

ORDER

IT IS ORDERED that defendant Marcus Kilgore’s motion for post conviction relief under 28 U.S.C. § 2255 is DISMISSED without prejudice as premature.

Entered this 28th day of May, 2009.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge